

Is Compulsory Vaccination Compulsory?

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On Thursday 8 April 2021, the European Court of Human Rights delivered its judgment in [Vavřinská and others v. the Czech Republic](#). The Grand Chamber ruled strongly (16:1) in favour of the Czech government, granting the state a wide margin of appreciation in the assessment of the need for compulsory vaccination of children. In light of the COVID-related challenges and the ongoing discussions about COVID passports and the possible limitations on the freedom of unvaccinated individuals, it is important that the Court took a clear stance regarding the importance of vaccination. At the same time, however, it is regrettable that the Court did not offer a stronger and more coherent reasoning justifying its value-driven decision.

Although the applicants relied on a number of Convention articles, the Court only engaged in a thorough substantive analysis under Article 8 (and solely in its private life dimension; 262), with only a very brief argumentation under Article 9 (freedom of thought, conscience and religion; 337), and with a succinct statement *‘that there is no need to examine [the] applications separately under Article 2 of Protocol No. 1’* (right to education; 345). The Court thus did not take the opportunity to clarify whether that provision applies also to pre-school education. (Judge Lemmens has put forward a persuasive criticism of the Court in this matter in his apposite separate opinion.)

The Court’s reasoning

The case originated in six applications brought against the Czech Republic between 2013 and 2015. The applicants challenged the vaccination duty imposed on all children residing on the Czech territory. The applicants had not been vaccinated but they complained of the consequences following from their non-compliance with the duty to be vaccinated: a fine of up to about 400 EUR imposed on the parents, and the exclusion of the unvaccinated children from pre-school education.

As to the context in which the judgment was delivered, there clearly is no European consensus as to whether vaccination of children should be compulsory (278). Some countries’ policies are based on mere recommendations while other states, including the Czech Republic, are much more prescriptive. What all countries have in common is that they *‘aim to achieve the highest possible level of vaccination among its population’* (277, 285).

Most of the Court’s reasoning was given in the context of the right to private life, under Article 8. Although none of the applicants had undergone vaccination, the Court was surprisingly unhesitating to find that there had been an interference with the applicants’ private lives (263; see also the government’s arguments to the contrary in 194). According to the Court, the interference consisted in the consequences of the

applicants' refusal to undergo vaccination which were intrinsically connected to the vaccination duty (263).

In determining whether the interference could be justified, the Court acknowledged that the law (266-271) pursued legitimate aims of protecting health and protecting the rights of others (272). The Court concluded that in matters of public health where no European consensus exists, the margin should be a wide one (276-280). The Court agreed with the government that there was a pressing social need to protect both individual and public health against the diseases in question (281-284) and to protect the best interest of children by maintaining herd immunity against certain diseases (285-289), concluding that the vaccination duty imposed by the Czech Republic was proportionate (290-309).

In the proportionality assessment, the Court reiterated that some exceptions from the vaccination duty were permissible, both in cases of a medical contraindication to vaccination (291) and in cases of a secular conscientious objection (292) developed in the Czech Constitutional Court's [case law](#). Neither of the two exceptions, however, was applicable to the applicants' situation. The Court approved of the existing procedural safeguards in the Czech legal order (295) and asserted the integrity of the policy-making process at the national level (297) as well as the effectiveness and safety of the vaccines (299). Although the applicants had not incurred any damage, the Court welcomed the availability of compensation in case of injury caused by compulsory vaccination in general (302).

As to the non-admission of children to pre-school education, the Court stated that this consequence was protective rather than punitive (294) and concluded that *'the loss of an important opportunity for these young children to develop their personalities and to begin to acquire important social and learning skills in a formative pedagogical environment'* was a *'direct consequence of the choice made by their respective parents'* (306). Given that the applicants were only restricted from pre-school education but not deprived of the possibility to enrol in primary school, the Court concluded that the examined measures were proportionate (309) and found no violation of Article 8 (311).

With regard to Article 9, the Court found that the applicants' critical opinion on vaccination was *'not such as to constitute a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9'* and concluded that the complaints were incompatible *ratione materiae* and had to be rejected (337). Finally, the Court decided not to examine the potential interference with the children's right to education without any explanation to that matter (345).

A brief analysis of the judgment

Having followed the applicants' case for a considerable period of time, I was not surprised by the Court's decision. The Court seized the opportunity to send a very clear signal *'that vaccination is one of the most successful and cost-effective health interventions'* (277) and to emphasise the value of social solidarity with those who cannot be vaccinated. In this regard, the ongoing COVID-crisis was clearly an elephant

in the room. Still, I expected a much higher quality of legal argumentation from the Court; I will now address five main weaknesses of the Court's reasoning.

A misleading perspective: not a clash of private life vs. public health

The *Vavriška* case was framed primarily in terms of a conflict between the private life of unvaccinated children *versus* the values of public health and social solidarity. That, however, is a misleading perspective. Is private life and bodily integrity truly at stake in cases where adults make decisions on behalf of their children while the children bear the consequences of those decisions, without even having a chance to decide about their own future? I strongly doubt that. Rather than a dichotomy of self-determination *versus* public health, the value conflict at stake relates to the tension between the parents' right to make decisions on behalf of their children and the state's right to impose duties by which it aims to protect public health as well as the best interest of the child at stake.

An adult person who refuses a vaccine against COVID-19 does so willingly and voluntarily, aware of the consequences. Such a decision represents an example of a person's self-determination. However, a child cannot make that choice; that value judgment is made by the parents, yet, the consequences will be borne by the child. That tension, however, remained unaddressed by the Court's judgment.

No forced vaccination, no interference with bodily integrity

The notion in the centre of the Court's attention was the margin of appreciation. Should it be very wide, given that the case concerns public health policy (274, 280), or very narrow, since the bodily integrity of vulnerable persons is at stake? (See also the dissenting opinion of Judge Wojtyczek, 7-8.) I am convinced that if the case originated in a story of a forced vaccination, the applicant's bodily integrity would be accentuated and the state's margin would be extremely narrow. Such a case could even be argued under Article 3 where the idea of a margin tends to fade away from the Court's reasoning.

However, the applicants in the *Vavriška* case had not been vaccinated against their will. Although the Court initially accepted that there had been an interference with their right to private life (263), some doubts about the intensity of that interference arose in the Court's reasoning on the merits. In 276, the Court first referred to an effective enjoyment of intimate rights but then reiterated that '*the weight of this consideration is lessened by the fact that no vaccinations were administered against the will of the applicants, nor could they have been, as the relevant domestic law does not permit compliance with the duty to be forcibly imposed*' (see also 303). The fact that the state had not even attempted to enforce the vaccination duty (293) seems to be of high importance; one could even doubt whether the applicants suffered any tangible interference with their rights guaranteed in Article 8.

Personally, I saw a much stronger potential in the applicants' right to education or the parents' right to decide on behalf of their children, rather than in the children's claim under private life and bodily integrity. Having framed the case as one of interference with the children's private lives, the case came dangerously close to abstract judicial

review of a national legislative measure, furthermore in a very sensitive policy area. Admittedly, the Court did not hesitate to engage in such abstract judicial review in the past (notably in cases such as [Klass v. Germany](#), [Dudgeon v. the UK](#), or [S.A.S. v. France](#)) but those cases were rather exceptional and the lack of a clear interference with the applicants' bodily integrity could have put the applicants on thin ice.

No distinction between contagious and non-contagious diseases

In my opinion, the Court's failure to distinguish between contagious and non-contagious diseases remains the principal deficiency of the judgment. Clearly, the state-imposed duty of vaccination protects two different legitimate aims: the health of the vaccinated child on the one hand (in relation to all diseases) and public health on the other hand (in relation to contagious diseases only). While the Court seems to have realised this dichotomy at the opening stage of its argumentation (272), it failed to maintain this distinction throughout its judgment. Briefly put, in the case of tetanus, a non-vaccinated child is the only one in danger, while in the case of measles, the danger pertains both to the non-vaccinated child and to everyone with whom the child has interacted, especially to those who have not been immunised against the disease.

The Court makes a very unpersuasive claim in 288: it opens the argument with reference to contagious diseases and herd immunity, but then makes a general claim encompassing also situations where '*herd immunity is not relevant due to the nature of the disease (e.g. tetanus)*', without any attempt to explain the difference between the two. (In his dissenting opinion, Judge Wojtyczek points to the lack of '*any logical link between the first and the second sentence*' in this paragraph and calls the argument '*a non sequitur*'; 15.) Similarly, when assessing the effectiveness of the vaccination, the Court refers to serious outbreaks which '*may cause disruption to society*' (300) without admitting that this only applies to some of the diseases included in vaccination duty.

Suitability of the measures to achieve the legitimate aim?

I may be opening Pandora's box here... but are the measures even suitable to achieve the (twofold) legitimate aim articulated by the Court in 272? If a child's parents steadily oppose the vaccination duty, burying them in fines will not protect their child's health. Similarly, the exclusion of a non-vaccinated child from pre-school education will not prevent all interactions of such child with its peers, given that it can still play on public playgrounds or participate in various free time activities where children interact. Moreover, exclusion from kindergarten is merely a temporary measure, given that one year later that child must enrol in obligatory primary education, thus coming into contact with peers and potentially endangering some of them. Obviously, both the fines and the exclusion from pre-school education probably play a deterrent role for many parents who may decide to comply with the duty under the threat of those sanctions; yet, a dutiful test of proportionality could pronounce the failure of a measure already at the stage of its suitability to achieve the pursued aim.

Missed opportunity to offer a truly persuasive reasoning

I fully subscribe both to Judge Wojtyczek's lament that the majority of the court '*express[ed] strong value judgments without a sufficient factual basis*' as well as to

his certitude that, nevertheless, *'there are strong objective arguments in favour of finding a non-violation of the Convention rights'* (dissenting opinion, 18). In other words, there were far better arguments for a judgment finding no violation than the Court has presented in the analysed judgment.

All in all, the state had a very strong position in the *Vavřinská* case. Unlike in cases on [sterilisation of women](#), [police brutality](#), or [lengthy judicial proceedings](#), this time the government was not attempting to excuse grave mistakes or systemic mishaps; rather, it defended a well-meant and reasonably well-functioning policy designed to protect the lives and health of its inhabitants, i.e. matters which belong to the states' positive obligations under the Convention (282). However, I understand the dissenting judge's desire for a better reasoning in which the Court would show *'that the benefits for society as a whole and for its members outweigh the individual and social costs and justify taking the risk of suffering the side-effects of a vaccination'* (dissenting opinion, 6).

Furthermore, the Court left many of the applicants' arguments unaddressed. To give but one example, the applicants claimed that while children must be vaccinated in order to enrol in a kindergarten, this duty is not enforced on the kindergarten's staff. The Court contented itself with a formalist argument: *'the staff members concerned should normally have received all the prescribed vaccinations at the relevant time, as required by law'* (308). Well, what if they have not received them, either because such vaccines did not exist at the relevant time, or simply because the staff members did not grow up in the Czech Republic? (See also Judge Wojtyczek's dissenting opinion, 15.) The Court's judgment seems to forget that staff members, as well as children, can travel from one state to another. In the absence of a European consensus on vaccination plans and with the growing mobility of persons, the states need a more persuasive solution for such situations.

Preaching to the choir?

In her dissenting opinion to the Czech Constitutional Court's plenary case on vaccination ([Pl. ÚS 19/14](#)), Judge Šimáková wrote: *'In most western European countries where human rights protection and respect for freedom and individual autonomy is at the highest level..., there is no vaccination duty imposed by law.'* Against this background, Judge Šimáková claimed that although the Czech paternalist healthcare system was not ready for an immediate abolishment of the vaccination duty, *'it should be a perspective aim of a state that respects the freedom of its citizens to carry out all medical interventions on the basis of a free and informed consent and, as far as medical interventions on children, that such consent should be essentially obtained from their parents...'*

As a recipient of Czech healthcare services, I am quite used to the durable paternalist arrangement. A couple of years ago, my physician informed me that the nurse would give me a tetanus vaccine. When I dared to ask about the pros and cons, the doctor reminded me sternly about the number of people sitting in the waiting room; *if she had to explain everything to everyone, her working day would be twice as long...*

Everyone familiar with the Czech healthcare system will understand that the shift from compulsory vaccination to a voluntary system is not imminent. Yet, if a state decides to impose a certain treatment on its inhabitants, the least it should do is to offer a strong and persuasive justification for such intervention in the persons' bodily integrity. Similarly, if the ECtHR is convinced that the Czech policy of compulsory vaccination does not breach the rights guaranteed by the Convention, its argumentation should be persuasive not only for those who believe in the importance of vaccines but primarily for those who do not.

